

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

W-I FORESTRY PRODUCTS, L.P.,)	
a LIMITED PARTNERSHIP,)	
)	PCHB No. 87-218
Appellant,)	
)	
v.)	FINAL FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
STATE OF WASHINGTON, DEPARTMENT)	AND ORDER
OF ECOLOGY,)	
)	
Respondent.)	

This matter, the appeal of a cease and desist order relating to the diversion of water from Brender Creek in Chelan County, came on for hearing before the Board, Wick Dufford (presiding) and Judith A. Bendor, on April 5, 1988, at Yakima, Washington.

Corinna D. Ripfel-Harn appeared as attorney for appellant W-I Forest Products. Peter R. Anderson, Assistant Attorney General, represented respondent, Department of Ecology. The proceedings were reported by Malinda Avery of Jackie Adkins & Associates.

1 Witnesses were sworn and testified. Exhibits were examined.
2 From the testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Appellant W-I Forest Products operates a lumber mill in Cashmere,
6 Washington. Brender Creek, a tributary to the Wenatchee River, flows
7 along part of the mill property boundary. The Wenatchee River runs
8 nearby, separated from the mill by a railroad right-of-way.

9 II

10 Respondent Department of Ecology is a state agency empowered to
11 administer and enforce the water resource laws of the state.

12 III

13 The lumber mill is reputed to be the oldest in continuous
14 operation between Seattle and Spokane. For more than 70 years water
15 has been diverted from Brender Creek for the mill's operations.

16 In 1966 the state issued a certificate of water right (priority
17 1964) for the mill, evidencing a second appropriation directly from
18 the Wenatchee River of "2.0 cubic feet per second for industrial use".

19 IV

20 On September 10, 1987, a water resources inspector for Ecology
21 posted a Notice of State Regulation at W-I Forest Products ordering
22 the mill to "cease and desist diversion of water from Brender Creek

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until you obtain water right permit authorization."

V

On September 16, 1987, W-I Forest Products filed an appeal of the posting with this Board, asking for a stay of the order to cease and desist diversion. On September 23, 1987, the Board heard the motion for stay and, thereafter, granted the same through the end of October 1987. Subsequent efforts at a negotiated resolution did not succeed and thus, the matter came on for hearing on the merits on April 5, 1988.

VI

The mill was built at its present site in the early part of this century by the Schmitten Lumber Company, a family concern which ran the business until the mid-1970's when it was sold to Pack River Lumber Company. Thereafter, the business was acquired by W-I Forest Products.

VII

Historically, water from Brender Creek has been used in the mill's boilers for saw and pump cooling, for dust control and to keep the logs wet. A log pond was maintained on the site until some time in the early 1970's when it was eliminated and the company converted to a log sprinkling operation.

VIII

At present, the mill property contains at least five acres of log

1 decks, where the logs are temporarily stored before being fed into the
2 mill and converted to boards. The conversion process involves
3 debarking, sawing into rough lumber, drying and then planing to
4 produce the finished product.

5 An extensive sprinkling system has been installed for the log
6 decks, both as a fire protection measure and to prevent the logs from
7 drying prematurely. If not keep wet, white fir and hemlock logs will
8 often split in the mechanical debarker and be ruined for further
9 milling.

10 IX

11 Water for the sprinkler system is now pumped from Brender Creek.
12 The diversion from the Wenatchee River is currently used in the mill
13 proper, principally for steam for the drying kilns.

14 The Wenatchee diversion could be modified physically to encompass
15 the log sprinkling function, but the plumbing for this kind of
16 operation has not been installed.

17 X

18 The Brender Creek diversion, though initiated long ago, is not
19 itself the subject of an appropriation permit or certificate issued by
20 the state. There is no evidence that this use has ever been confirmed
21 as a right in a general adjudication.

22 Moreover, no statement of claim asserting a right to divert from
23

1 Brender Creek for the mill was filed pursuant to the claims
2 registration statute, Chapter 90.14 RCW.^{1/}

3 XI

4 Schmitt Lumber Company applied to the state for permission to
5 initiate the diversion from the Wenatchee River in 1964 under the
6 rubric "industrial use". In answer to a questions about other water
7 rights appurtenant to the property, the application stated: "Brender
8 Creek water by right of use prior to 1917."

9 The Report of Examination for the Wenatchee diversion (written in
10 1964), recommended issuance of a permit and stated that "the water
11 requirement for operation of a sawmill and steam boilers is calculated
12 on a continuous diversion of 2.0 c.f.s."

13 The Report dealt with the Brender Creek diversion as follows:

14 Applicant has used water from Brender Creek for
15 many years, this source however has become
16 undesirable because of the quality of the water
17 as well as an insufficient amount during low flow
18 periods. Applicant intends to maintain only
19 emergency standby facilities from Brender Creek.
20 Permit shall be subject to the following special
provisions: "Issued as a supplemental supply to
a vested claim to water right from Brender Creek,
the total amount annual diversion shall not
exceed 1440 acre-feet from both sources."

21 ^{1/} The claims registration statute established a five year period,
22 with June 20, 1974 as the deadline for filing claims. RCW 70.94.041
23 Subsequently, filing was reopened briefly in 1979 and 1985. Section
24 4, Chapter 216, Laws of 1979, ex. sess.; Section 1, chapter 435, Laws
of 1985. Neither W-I Forest Products nor its predecessors filed a
claim for the Brender Creek diversion during any of these filing
periods.

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1 A permit for the Wenatchee diversion was issued as a supplemental
2 right, consistent with the examiner's recommendation. In 1966 upon
3 proof of appropriation, a certificate (SWC No. 9658) was issued,
4 subject to the conditions set forth in the permit.

5 XII

6 Seventeen years later, in 1983, Ecology adopted chapter 173-545
7 WAC, the Instream Resources Protection Program, Wenatchee River
8 Basin. By this act, minimum instream flows were established for the
9 Wenatchee River. The effect was to make all future consumptive water
10 right permits issued for diversion of surface water from the main stem
11 of the Wenatchee and perennial tributaries subject to the instream
12 flows. WAC 173-545-030(4).

13 Brender Creek is a perennial tributary. Thus, a new permit to
14 appropriate water from the mill's present creek diversion site would
15 call for diversions to cease when water in the river was at or below
16 the specified minimum, as measured at the appropriate gage.

17 XIII

18 In 1986, while in the area, Ecology's inspector noted the mill's
19 pump on the creek. In June of 1987, the inspector wrote to W-I Forest
20 Products, Inc., inquiring about rights for the diversion. On July 24,
21 1987, the inspector followed up with a detailed letter, advising that
22 his searches of the state's records ~~showed~~ disclosed no permit or
23 certificate for the mill to divert from the Creek.

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1 The letter stated in part:

2 From my research, I conclude that Schmitten
3 Lumber Company may once have enjoyed a vested
4 water right for the Brender Creek pump location,
5 but that such vested right was forfeited when
6 Schmitten Lumber Company or its successor(s)
7 failed to file a water right claim form with the
8 state as required by Chapter 90.14 of the Revised
9 Code of Washington. (RCW).

10 In reference to the certificate for diversion from the Wenatchee
11 River, the letter stated:

12 This certificate was issued as supplemental to the
13 undocumented Brender Creek vested water right.
14 Since the Brender Creek right has apparently
15 relinquished, Surface Water Certificate No. 9658
16 has now become the primary water right.

17 XIV

18 In response to Ecology's letter, W-I Forest Products, in August
19 1987, applied to the agency for a new permit for the Brender Creek
20 diversion. This record does not show that the matter has been ruled
21 upon by Ecology.

22 XV

23 The posting performed on September 10, 1987, was the outgrowth of
24 a complaint by a Brender Creek diverter downstream of the mill, whose
25 appropriation is recent and, therefore, subject to interruption when
26 minimum flows are reached.

27 At that time, the river was below the minimums and such recent

1 diversions had been shut down. In these circumstances, the complaint
2 asserted that W-I Forest Products was continuing to divert without any
3 authority to do so.

4 XVI

5 In this appeal, W-I Forest Products asserts the validity of its
6 historical diversion from Brender Creek and argues that, in fairness,
7 the state cannot properly maintain the contrary. This position, if
8 sustained, would allow the continuation of the diversion free of
9 interruption at times of minimum flow in the river.

10 We are not asked here to determine if Ecology may allow W-I
11 Forestry Products to move the point of diversion for the Wenatchee
12 River right to Brender Creek or whether the use of the Wenatchee River
13 right can encompass all the uses, including log sprinkling, made of
14 water at the site. We note, however, that the total amount allocated
15 under the certificate (SWC No. 9658) is more than that needed for
16 boiler and other in-mill operations alone. We are also convinced that
17 log sprinkling is encompassed within the "industrial use" category.

18 XVII

19 Any Conclusion of Law which is deemed a Finding of Fact is hereby
20 adopted as such.

21 From these Findings the Board comes to the following

22 CONCLUSIONS OF LAW

23 I

24 The Board has jurisdiction over these parties and these matters.

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1 Chapters 90.03, 90.14 and 43.21B RCW.

2 II

3 The question before the Board is a narrow one: Should Ecology's
4 action in ordering W-I Forest Products to cease and desist from
5 diverting water from Brender Creek on September 10, 1987, be sustained?

6 III

7 In regulating water use, Ecology is not empowered to adjudicate
8 existing rights but must, nonetheless, make tentative determinations
9 about the validity of such rights. See Funk v. Barthalet, 157 Wash.
10 584, 289 P.2d 1018 (1930); Stempel v. Department of Water Resources,
11 82 Wn.2d 109, 508 P.2d 166 (1973).

12 The tentative determination made here was that no valid right
13 exists in W-I Forest Products to divert water directly from Brender
14 Creek. The basis for this determination was that, absent a
15 state-issued permit or certificate, the legitimacy of a historical use
16 is preserved only by having on file a claim of right made pursuant to
17 RCW 90.14.041. No such claim is on file for the Brender Creek
18 diversion.

19 IV

20 Under RCW 90.14.071 any person who claims a diversionary right
21 (not evidenced by a state-issued permit or certificate) but who fails
22 to file a statement of claim for such right "shall be conclusively
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1 deemed to have waived and relinquished any right, title, or interest
2 in said right." (emphasis added).

3 This statutory language leaves no room for construction. The
4 failure to file means the loss of any right which might have existed.

5 We conclude, therefore, that Ecology's tentative determination
6 must be upheld. Further we hold that the cease and desist order,
7 under the circumstances, should be affirmed.

8 V

9 W-I Forest Products argues that the information provided to
10 Ecology in connection with its 1964 application for diversion from the
11 Wenatchee River constitutes substantial compliance with the claims
12 registration statute as to the Brender Creek diversion, citing
13 Department of Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).

14 We agree that the information then submitted contains much of the
15 information required by RCW 90.14.051 for a statement of claim. We
16 further agree that the general statutory purpose "to cause a return to
17 the state of any water rights no longer exercised" (RCW 90.14.010) is
18 not served by terminating the Brender Creek diversion.

19 However, despite the equities, we are not at liberty to rewrite
20 the plain and explicit language of the statute.

21 Adsit is readily distinguishable from the instant case. In Adsit
22 the claimant had filed a document (on the wrong form, but
23 substantially complying with the claims statute) during the statutory
24

1 1969-74 filing period. Here the assertion is that documents lodged
2 with the state years before the claims statute was even enacted
3 constitute substantial compliance.

4 We cannot accept this argument. The water resources files of the
5 state which predate the claims statute are without doubt, full of
6 passing references to claimed rights, not otherwise officially
7 documented. To conclude that such references, if sufficiently
8 descriptive, constitute compliance with a later enacted statute, would
9 be largely to nullify the effect of that statute. Without a filing
10 during the prescribed registration period, Ecology's records simply do
11 not disclose whether a claim asserted in 1964 was still being asserted
12 in 1974.

13 As pointed out in Adsit, quoting Texaco, Inc. v. Short, 454 U.S.
14 516, 526 (1982):

15 "just as a State may create a property interest,
16 . . . , the State has the power to condition the
17 permanent retention of that property right on the
18 performance of reasonable conditions that indicate
a present intention to retain the interest." 103
Wn.2d at 707.

19 Here the problem is that no claimant expressed the intention to retain
20 the interest during the time statutorily provided for that purpose.

21 VI

22 W-I Forest Products further argues that Ecology is estopped to
23 deny the existence of a right to divert from Brender Creek. Again,
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1 this position cannot be accepted because it was the Legislature, not
2 Ecology, which enacted the claims statute. Chapter 233, Laws of 1967,
3 substantially amended by Chapter 284, Laws of 1969.

4 Ecology evidently did recognize the validity of the Brender Creek
5 diversion in 1964. What caused the agency to change its position in
6 1987 was the intervening act of the Legislature which created a new
7 legal requirement that was not met.

8 In a proper case, Ecology may be estopped to repudiate its prior
9 position. But the Legislature is not estopped from adding to the law.

10 VII

11 Additionally, W-I Forest Products maintains that the posting
12 process, by which an order to cease and desist is entered without a
13 prior hearing, is a violation of due process of law.

14 This is a constitutional issue over which this Board has no
15 jurisdiction. Yakima County Clean Air Authority v. Glascam Builders,
16 85 Wn.2d 255, 534 P.2d 33 (1975).

17 We do observe, however, that the transitory nature of water, the
18 complexity of the priority system and the variability of supply and
19 demand, have traditionally been viewed as presenting emergent
20 circumstances, placing water resources enforcement in a category akin
21 to health and safety codes, requiring immediate action prior to
22 hearing. See, e.g., State v. Lawrence, 165 Wash. 508, 6 P.2d 363
23 (1931).

VIII

Finally, we agree with Ecology's analysis that the Wenatchee River right does not in any sense embody the older Brender Creek right. When no claim to the Brender Creek diversion was filed, that right was relinquished. The Wenatchee River diversion, initially defined as a supplemental right, then became a primary right, because of the failure of the condition which initially limited its scope. But it remained a separate and distinct entitlement with its own separate priority and attributes.

The Wenatchee River right has never included any place of diversion other than the Wenatchee River as described on its certificate. When the Brender Creek right ceased to exist, the Wenatchee River right did not somehow expand to include the old right's features. See generally, Schuh v. Department of Ecology, 100 Wn.2d 180, 667 P.2d 64 (1983).

Accordingly, the Brender Creek right was not exempt from filing as a claim by virtue of being "based on the authority of a permit or certificate" issued by the State. RCW 90.14.041.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters the following

ORDER

The cease and desist order posted by the Department of Ecology on the September 10, 1987, at W-I Forest Products' Brender Creek diversion is affirmed.

DONE this 5th day of October, 1988.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Member

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